84-641

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
BROTHERHOOD OF RAILROAD SIGNALMEN,
BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
and the UNITED TRANSPORTATION UNION,
Petitioners,

v.

UNITED STATES OF AMERICA, and the
INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Date: October 19, 1984

Questions Presented For Review

In the opinion of petitioners Brotherhood of Maintenance of Way Employes, Brotherhood of Railroad Signalmen, Brotherhood of Railway and Airline Clerks, International Association of Machinists and Aerospace Workers, and the United Transportation Union,* the following issues are presented by this case:

1. Did the United States Court of Appeals for the District of Columbia Circuit improperly narrow the protections which Congress has given railroad employees since 1940 by concluding that the mandatory instructions in Section 11344(b)(1)(D) of the Interstate Commerce Act, 49 U.S.C. § 11344(b)(1)(D), that the Interstate Commerce Commission consider "the interest of carrier employees affected by the proposed transaction," required the Commission to consider the interests of only applicant rail carrier employees affected by the proposed transaction when deciding whether that proposed transaction was consistent with the public's interest?

2. Did the United States Court of Appeals for the District of Columbia Circuit err in concluding that Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, did not require the Interstate Commerce Commission to provide a fair arrangement, or to even consider whether, in its discretion, it should provide such an arrangement to protect the interests of rail carrier employees who were not employees of the applicant carriers, but who were adversely affected by the control and related transactions approved by the Commission in this case?

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* Besides respondents United States of America and the Interstate Commerce Commission which are named in the caption of this case, the following parties are listed as respondents herein pursuant to Rule 19.6 of the Rules of this Court, even though several of these parties are filing separate petitions with the Court: American Train Dispatchers Assoc.; Atchison, Topeka & Santa Fe Railroad; Denver & Rio Grande Western Railroad; Kansas City Southern Railway; Louisiana & Arkansas Railway; Missouri Pacific Corp.; Missouri Pacific Railroad; St. Louis Southwestern Railway; Southern Pacific Transportation Co.; Union Pacific Corp.; Union Pacific Railroad; Western Pacific Railroad; and Edward K. Wheeler.

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No.

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Petitioners Brotherhood of Maintenance of Way Employes, Brotherhood of Railroad Signalmen, Brotherhood of Railway and Airline Clerks, International Association of Machinists and Aerospace Workers, and the United Transportation Union [hereinafter, "Rail Labor petitioners"], pursuant to 28 U.S.C. § 1254(1), respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review and to reverse the decision of that court which was entered on May 22, 1984, affirming a decision and order of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"]

which approved the creation of a consolidated rail system encompassing the Union Pacific, Missouri Pacific and Western Pacific railroads.

Opinions Below

The decision of the United States Court of Appeals for the District of Columbia Circuit which denied Rail Labor's petition to set aside the order of the ICC, is reported below as *Southern Pacific Transportation Co.* v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984); that decision is reproduced as Appendix A in the separately bound Appendix which was filed with this Court on October 17, 1984, in this and in two other cases under the lead caption *Kansas City Southern Ry.* v. *United States*, Sup. Ct. No. 84-621. That decision affirmed in all material respects a decision and order of the ICC which had been served on October 20, 1982, and which is reported as *Union Pacific Corp.—Control—Missouri Pacific Corp.*, 366 I.C.C. 459 (1982); that ICC decision and order is reproduced as Appendix B in the separately bound Appendix.

Jurisdiction

On November 1, 1982, the Rail Labor petitioners filed a petition with the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. §§ 2321(a) and 2341, *et seq.*, requesting that court to review the decision and order of the ICC which had been issued on October 20, 1982; that petition was subsequently transferred to the United States Court of Appeals for the District of Columbia Circuit and consolidated with earlier petitions which had been filed by other parties to review that same ICC decision and order. On May 22, 1984, the court of appeals issued its decision which, among other rulings, rejected Rail Labor's challenges to the ICC's order (Appendix A at 34a), and affirmed that order in material part.[1]

[1] The court of appeals also concluded that the Commission failed to explain adequately its reasons for denying the Denver & Rio Grande Western Railroad's request for independent rate making authority (Appendix A at 32a-33a), and remanded the case to the ICC for further consideration of that issue. *Id.* at 38a. All other challenges raised by the numerous petitioners before that court were rejected.

Although the Rail Labor petitioners did not file a petition for rehearing, several other parties did,[2] but on July 20, 1984, the court of appeals denied those petitions. Rail Labor Petitioners asked this Court through Chief Justice Warren E. Burger to extend the time in which they could file with this Court a petition for a writ of certiorari, and on August 2, 1984, this Court granted petitioners herein an extension of time to and including October 19, 1984, in which to file this petition. *Brotherhood of Maintenance of Way Employes, et al.* v. *ICC*, Sup. Ct. No. A-65. This petition for a writ of certiorari has been filed within that extended time period pursuant to 28 U.S.C. § 1254(1).

Statutes Involved

Besides those statutory provisions set forth in full in Appendix E in the separately bound Appendix, Rail Labor petitioners submit that the following statute is involved in its petition:

Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, provides as follows:[3]

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this

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[2] Three petitions for rehearing were filed in this case: Edward K. Wheeler filed one in D.C. Cir. No. 82-2342; the American Train Dispatchers Association filed one in D.C. Cir. No. 82-2479; and the Kansas City Southern Ry. and Louisiana & Arkansas Ry. filed one in D.C. Cir. No. 82-2370.

[3] 49 U.S.C. § 11347 is a recodification without substantive change of former Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f) (repealed). Pub. L. No. 95-473, 92 Stat. 1337 (1978). Since Congress specifically provided in the recodification statute that the changes in wording were not to be "construed as making a substantive change in the law replaced" (§ 3(a), 92 Stat. 1466), petitioners have included as Appendix J to this Petition former Section 5(2)(f) along with Section 11347 to enable a ready comparison of the two provisions.

> subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

Statement of the Case

In September 1980, the Union Pacific Corporation, the Missouri Pacific Corporation, and their related railroad subsidiaries the Union Pacific and Missouri Pacific railroads, filed a series of applications with the Commission seeking approval of the Union Pacific's control of the Missouri Pacific under 49 U.S.C. §§ 11343 and 11344. At that same time, the Union Pacific filed an application for Commission approval of its control of the Western Pacific Railroad. Appendix B at 60a-61a. Those applications generated a plethora of responses including oppositions from many competing railroads and requests from rail labor that the Commission carefully consider, weigh and protect the interests of railroad employees who might be affected by the transactions, if those transactions were to be approved. In October 1982, the ICC issued a massive decision of almost two hundred pages of text in which it concluded that the control applications were consistent with the public interest. That decision and order approved those applications, subject to certain conditions, including provisions intended to protect some, but not all, of the rail carrier employees who might be affected by those transactions. Appendix B at 310a-11a, 327a-30a. On December 22, 1982, the applicants effectuated their control transaction.

When the combined rail system became a reality in December 1982, that system consisted of approximately 22,297 miles of track stretching from all major ports on the West Coast to the major ports in the Gulf area. Appendix B at 63a-64a.

Besides being extensive in size, the combined system and its corporate relations were gargantuan in financial terms, for the combined corporate systems, including their non-rail interests, together grossed $6,177,236,000 in 1979, with net revenues of $567,357,000. Appendix B at 62a-64a. Except for the Burlington Northern Railroad, the new rail system—*i.e.*, the Pacific Rail System, Inc.—clearly dwarfed all other rail systems west of the Mississippi. Appendix B at 595a-613a.

A. *Impact of Pacific Rail System on Railroad Employees*

Rail labor protested against the control and related applications because the petitioners asserted that an approval of those applications would have a harmful effect on their members who were employed either by the control applicants or by the other railroads which would be adversely affected by the strength of the combined system. While the ICC examined the impact which the consolidation would have on Union Pacific, Missouri Pacific and Western Pacific railroad employees (Appendix B at 277a), the Commission did not discuss or even acknowledge the evidence in the record which showed the devastating impact which the consolidation would have on the employees of the carriers which will have to eke out their existence in many of the markets now dominated by the newly created Pacific Rail System.

Rail Labor presented evidence to the Commission which showed that consolidating the previously independent and competing Union Pacific, Missouri Pacific and Western Pacific railroads would adversely affect employees on the Atchison, Topeka & Santa Fe Railway, the Burlington Northern, the Chicago, Milwaukee, St. Paul & Pacific Railroad, the Denver & Rio Grande Western Railroad, the Illinois Central Gulf Railroad, the Kansas City Southern Railway, the Missouri-Kansas-Texas Railroad and the Southern Pacific system [hereinafter, "Sante Fe," "BN," "Milwaukee," "Rio Grande," "ICG," "KCS," "Katy," and "SP," respectively]. That evidence showed, for example, that over 500 railroad jobs on the Milwaukee would be placed in jeopardy by the creation of the Pacific Rail System, and that from 20% to 40% of the KCS trainmen at the Kansas City terminal stood to lose their jobs due to rail traffic being diverted to Pacific Rail System.

Rail Labor's predictions did not stand unsupported, for the affected carriers also presented evidence which showed that their employees would bear a substantial burden as a result of the Pacific Rail System's success. For example, the Rio Grande estimated that approximately 176 of its employees would lose their jobs as a result of the consolidation, even if that carrier were granted all of the relief it was seeking in this case; without such relief, the Rio Grande believed that approximately 350 of its employees would be deprived of their jobs. Both the SP and Santa Fe also predicted that their employees would be impacted severely by the consolidated Pacific Rail System, for the SP's Vice President of Operations stated that as many as 1,000 SP employees could lose their positions as a long-term result of the consolidation, and the Santa Fe predicted that over 200 of its employees would lose their jobs because of traffic diverted to the consolidated system.

Those estimates of substantial employee impact were further substantiated by the evidence in this record, for in its decision, the Commission concluded that the protesting railroads were correct in believing that the Pacific Rail System would divert traffic from their lines which would in turn cause most of them to sustain substantial losses of revenue.[4] While the Santa Fe submitted that it would lose $64 million in gross revenues per year due to traffic diversions, the ICC concluded that a loss of $54.3 million was supported by the evidence. Appendix B at 458a. The Milwaukee believed that it would lose $5.4 million annually (*Id.* at 69a) and the Rio Grande expected to lost $35.3 million in gross revenues per year due to the consolidation. *Id.* at 69a-70a. According to the ICC, both estimates were reasonable. *Id.*, at 461a, 476a-77a. Even though the ICC did not accept in full the estimates by the KCS and SP as to their expected losses (*i.e.*, the KCS predicted a loss of $13.6 annually, and the SP predicted a loss of $105.2 million per year), the ICC concluded that both carriers, considering

[4] The BN predicted it would lose $193.9 million in gross revenues per year by 1985 in lost coal movements, but the ICC opined that this loss would not occur because the BN's predictions were based on the anticompetitive aspects of the consolidation on coal movements and the Commission had concluded that the transaction was not anticompetitive. Appendix B at 458a-59a.

their relative sizes, would sustain substantial traffic diversions; the KCS' annual loss was placed at $5.2 million by the ICC, and the SP's was placed by that agency at $54.5. Appendix B at 471a, 505a.

Those revenue losses clearly jeopardized the jobs of many railroad employees because as Rail Labor pointed out to the ICC, albeit without effect, carriers reduce forces when they suffer a decline in revenues. Moreover, the effect of the elimination of jobs as a result of diversions of traffic away from competing carriers does not end with the employees whose jobs are in fact abolished. The employees' exercise of seniority to bid into positions held by individuals in the same craft or class with lesser seniority, creates an effect which ripples through the entire seniority district of the affected carriers. The net result may well be the furloughing of workers with the lowest seniority, who will be forced into a job market that already faces a severe and significantly high rate of unemployment.

When an employee is furloughed because of traffic diversions, the hardships of unemployment do not depend on whether he was employed by the applicant carrier or by another carrier. The result, the cause, and the consequent need for protections from adverse effects of the transactions at issue are all identical, no matter who was the employing carrier prior to the creation of the Pacific Rail System. In a case such as the one at bar, however, being an employee of the consolidated carriers is helpful to the furloughed employee because the consolidation, according to the applicants, will increase employment opportunities for their employees in the long run. Consequently, a furloughed employee of the Pacific Rail System has a chance of being reemployed; an employee of a non-applicant who is furloughed because of the consolidation, does not enjoy that same prospect of reemployment in the railroad industry.

B. *ICC's Consideration of Railroad Employee Interests*

As the ICC acknowledged in its decision, its consideration of the control applications was governed by 49 U.S.C.

§ 11344(b)[5] which required the Commission to consider various factors in determining whether a proposed consolidation is consistent with the public interest, including the impact of the transaction on the interests of "carrier employees." Appendix B at 78a, 84a. Rail Labor had asked the ICC to consider the interests of all railroad employees which the record showed would be affected by this consolidation, and not just the interests of those employees who were employed by carriers which were applicants in this case. While the ICC conceded in its brief to the court of appeals in this case that the "employees" referred to in 49 U.S.C. § 11344(b)(4) included *all railroad* employees affected by the proposed transactions and not just employees of the applicant carriers (ICC Brief to D.C. Cir. at 19, 76), the ICC did not specifically, or even indirectly, address the interests of non-applicant carrier employees while it was considering whether the control applications were consistent with the public interest.

That failure was not from lack of opportunity, for the ICC's own analysis showed that the consolidated system would divert traffic worth $184.8 million annually in revenue from competing railroads. Appendix B at 591a-92a. However, in analyzing the impact of that diversion upon the public interest, the ICC examined only the effect that this loss of traffic would have upon the competing railroads' ability to provide essential rail services; it did not go that one step further and examine what impact this loss of revenue would have on rail employees. As the ICC explained in defining the scope of its inquiry on this subject:

> Consolidations often cause shifts in market patterns and divert traffic away from non-included carriers. Sometimes carriers losing market share as a result of the consolidation may not be able to withstand the loss of traffic and must downgrade and perhaps eventually abandon their routes. Traffic diversions

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[5] On October 14, 1980, § 228 of Public Law No. 96-448, 94 Stat. 1895, 1931, was enacted which modified 49 U.S.C. § 11344(b); that amendment did not modify § 11344(b)(4). Section 11344 was further amended by § 21 of Pub. L. No. 97-261, 96 Stat. 1123, which redesignated Section 11344(b)(4) as 11344(b)(1)(D); that amendment was not effective until after the ICC's decision was issued in this case.

> could even lead to financial failure of a railroad and liquidation of its system. It is not our duty to ensure preconsolidation levels of traffic for competitors. Our concern is the preservation of essential services, not the survival of particular carriers.

Appendix B at 168a. Its review in this case led it to conclude that "no carrier will incur revenue losses as a result of the proposed transactions to a degree threatening its ability to continue to provide service over its system." *Id.* at 169a. Even though it recognized that several competing carriers would suffer severe revenue losses and that they would have to modify their existing operations to survive (*Id.* at 509a-15a), the ICC did not consider in its decision the impact which those actions would have on railroad employees, and it did not show what role, if any, that impact on employee interests played in its public interest analysis.

When it did address Rail Labor's arguments that Section 11344(b)(4) of the Interstate Commerce Act required it to examine the impact of the transaction on competing railroad employees, the ICC viewed that argument as if petitioners were asserting that Section 11344(b)(4) "require[d] us to impose labor protective conditions to protect all railroad employees, both of applicants and non-applicants alike, which are adversely affected by a consolidation proceeding." Appendix B at 280a. According to the ICC, Section 11344(b)(4)'s requirement that employee interests be considered did not also require that those interests be protected; as the ICC stated,

> The general language in section 11344(b) is designed to focus our consideration of these primary transactions, and is not intended to be used as a vehicle for mitigating incidental impacts. This language, which itemizes the several criteria to be considered in making our public interest determination in a consolidation proceeding, in no way supplements or contradicts the specific Congressional directive concerning labor protective conditions in 49 U.S.C. § 11347. . . .

Appendix B at 280a.

Relying upon 49 U.S.C. § 11347 and alternatively upon the Commission's equitable powers under Section 11344(c) to impose conditions upon its approval of a transaction, Rail Labor had also asked that the ICC condition any approval of the transaction by imposing a fair arrangement to protect the interests of all railroad employees affected by the proposed transactions. In its decision, the ICC rejected petitioners' interpretation of the reach of Section 11347 because it concluded that:

> The meaning of [that section] . . . , as confirmed by pertinent legislative history, is well established. Congress, at the time of enactment of the Transportation Act of 1940, did not consider protection of employees beyond those employed by the carriers that were parties to the transaction itself. This legislation was unchanged until the 4R Act, which expanded the scope of employee protection, but not the class of employees to be protected. . . .

Appendix B at 280a-81a. The ICC never addressed Rail Labor's discretion argument and the Commission did not impose any conditions in its Order to protect the interests of non-applicant railroad employees whom the evidence showed would be affected by the consolidation in this case.[6]

C. *Court of Appeals Consideration of Employee Challenges*

In the proceedings before the court of appeals on Rail Labor's petition to review the ICC's decision and order, petitioners challenged both the ICC's failure to consider the interests of the employees of the competing rail carriers when it concluded that the control applications were consistent with the public interest, and the Commission's failure to impose an

[6] The ICC did impose employee protective provisions as a condition of its approval of certain trackage rights and/or pooling arrangements which were granted to four (4) of the competing carriers; those protective arrangements protect the employees of those competing carriers who are affected by the trackage rights or pooling arrangement, but do not include protections for injuries caused by the diversion of traffic. Appendix B at 281a.

arrangement to protect the interests of those railroad employees. Those arguments were characterized and rejected by the appellate court by the following statement:

> Petitioners' first argument—that 49 U.S.C. §§ 11344(b)(1)(D) and 11347 require the Commission to protect the interests of all affected railroad employees—has been recently considered and rejected by this court. *See Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295, 323-24 (D.C. Cir. 1983). We see no need at this point to add to the thorough discussion of that opinion nor do we find any different result warranted.

Appendix A at 34a.

In *Lamoille Valley,* the appellate court was faced with a challenge by the Lamoille Valley Railroad (a competing, non-applicant carrier) to the ICC's failure to consider or to protect the interests of its employees when that agency approved a control case involving the Maine Central and the Boston & Maine railroads. Appendix I at 1b.[7] Both aspects of the Lamoille Valley's challenge were rejected because the court concluded that the class of carrier employees referred to in both Sections 11344(b)(4) and 11347 referred to employees of the applicants only. *Id.* at 3b. That construction of the Act was, in the court's view, sensible, supported by its legislative history, and consistent with prior interpretations of these sections by the ICC and by other federal courts. *Id.* at 3b-5b.

That view of the Act, although it led the court to the same result reached by the ICC, is inconsistent with the Commission's prior interpretation of Section 11344(b) that Congress has required it to consider the interests of all railroad employees in making its public interest finding. *See,* page 8, *supra.* Moreover, that view of the limited nature of Section 11347 is inconsistent with a line of cases in the 1960's which clarified that Congress required the ICC to impose a fair arrangement to protect all railroad employees affected, and not just employees of the applicants.

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[7] For the convenience of this Court, petitioners have attached to this petition a copy of the relevant portions of the court of appeals' decision in *Lamoille Valley;* these excerpts have been designated as Appendix I since the last appendix in the separately bound Appendix was designated at Appendix H.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Conflicts With Other Decisions By Reviewing Courts on an Issue Which is Important to the Orderly Administration of the Interstate Commerce Act

It has long been recognized that the railroad employee is an essential component of our nation's rail transportation system, and since at least 1933 with the passage of the Emergency Railroad Transportation Act, 48 Stat. 211, Congress has recognized the importance of shielding all railroad workers from bearing unaided the burden of the economies which rail carriers can achieve at the expense of labor. *E.g.*, Emergency Railroad Transportation Act of 1933, § 7, 48 Stat. 218. Before its present change of philosophy, the ICC was well aware of the important role which rail labor played in maintaining an efficient national rail transportation system (*e.g., St. Paul Bridge & Terminal Ry.—Control,* 199 I.C.C. 588, 595 (1934)), and lest it forget, Congress in 1940 mandated that whenever the Commission considered a merger or related application, it must consider "the interest of the carrier employees affected." 49 U.S.C. § 5(2)(c)(4), now 49 U.S.C. 11344(b)(1)(D). Moreover, Congress also commanded in that same legislation that whenever the ICC authorized a transaction under those merger provisions, it must "require a fair and equitable arrangement to protect the interests of the railroad employees affected." 49 U.S.C. § 5(2)(f), now 49 U.S.C. § 11347.

When it enacted what are now Sections 11344(b)(1)(D) and 11347 in 1940, Congress was concerned with preserving an efficient *national* rail transportation system, and it made mandatory the consideration of employee interests which, as this Court had stated in *United States* v. *Lowden,* 308 U.S. 225 (1939), were encompassed within the public interest:

> It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress *and its harsh consequences may so seriously affect employee morale as to require*

> *their mitigation both in the interest* of the successful prosecution of the Congressional policy of consolidation *and of the efficient operation of the industry itself,* both of which are of public concern within the meaning of the statute.

308 U.S. at 233 (footnote omitted; emphasis added).

This national interest in the "stability of the labor supply available to the railroads" has been recognized since the passage of the 1940 Transportation Act, and it is the effect of a particular transaction upon all employees who comprise this "national railroad system" (*see, ICC* v. *Railway Labor Executives' Assoc.,* 315 U.S. 373, 377 (1942)) which is the aspect of the public interest factor to which Congress was referring when it enacted what is now 49 U.S.C. § 11344(b)(1)(D). Congress' concern, as is evident from the inclusion provisions of Section 11344(b)(1)(B), was not solely with the applicant carriers, but with all rail carriers, and *a fortiori* with their employees, in the applicants' service area. That concern requires that the interests of all railroad employees affected be considered and weighed in the public interest determination.

Congress' commands which are set forth in Sections 11344(b)(1)(D) and 11347 have been the subject of several review proceedings since 1940. In all but one of those cases, the appeal from which was subsequently dismissed as moot,[8] the reviewing courts either have specificially concluded or have assumed that the term "carrier employees" as used in what is now Section 11344(b)(1)(D) referred to all railroad employees and not just to "carrier employees of the applicants." *Missouri-Kansas-Texas R.R.* v. *United States,* 632 F.2d 392, 412-13 (5th Cir. 1980), *cert. denied,* 451 U.S. 1017 (1981); *Soo Line R.R.* v. *United States,* 280 F. Supp. 907, 923 (D. Minn. 1968) (3 Judge Court); *Railway Labor Executives' Assoc.* v. *United States,* 226 F. Supp. 521, 525 (E.D. Va.) (3 Judge Court), *vacated on other grounds,* 379 U.S. 199 (1964); *Railway Labor Executives' Assoc.* v. *United States,* 216 F. Supp. 101, 102-03 (E.D. Va. 1963) (3 Judge Court). Indeed, the Com-

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[8] *Florida E.C. Ry.* v. *United States,* 259 F. Supp. 993 (M.D. Fla. 1966) (3 Judge Court), *appeal on relevant part dismissed as moot sub nom. Railway Labor Executives' Assoc.* v. *United States,* 386 U.S. 544 (1967).

mission itself has acknowledged in this case, both in its decision (Appendix B at 80a, 84a) and in its brief to the court of appeals (ICC Br. at 19, 76), that the term "carrier employees" in Section 11344(b)(1)(D) refers to all railroad employees who might be affected by the proposed transaction. In light of the breadth of the other specifically enumerated factors in section 11344(b)(1) and the policy statement in Section 10101a(12) that the ICC must "encourage fair wages and safe and suitable working conditions in the railroad industry" when it exercises its powers under the Act, it is difficult to see how the ICC or any court could legitimately take a more narrow view of the term "carrier employees."

Nevertheless, the court of appeals in this case, by adopting its earlier discussion in *Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295 (D.C. Cir. 1983), has narrowed the class of employees which the vast majority of reviewing courts have said are encompassed within the plain terms of Section 11344(b)(1)(D). By thus narrowing the term "carrier employees" to "carrier employees of the applicants," the court of appeals has effectively repealed a significant part of the procedural protections which Congress gave to railroad employees in 1940 and has, in effect, deprived thousands of rail employees of a clear statutory right to demand that the ICC consider their interests and weigh those interests in its public interest determination before it authorizes other railroads to consummate a transaction which could destroy their economic livelihood.

Such a callous disregard of railroad employees is contrary to Congress' intent as expressed in virtually every major piece of legislation affecting our nation's railroads since the Transportation Act of 1920, 41 Stat. 456, that the interests of all railroad employees are an important aspect of the public interest. *E.g., United States* v. *Lowden, supra,* 308 U.S. at 235-38. Congress' concern for the welfare of all railroad employees has not changed in recent years, for Congress has recently recognized that "experienced railroad employees make a valuable contribution toward strengthening the railroad industry" (Section 2(a)(4), Milwaukee Railroad Restructuring Act, 45

U.S.C. § 901(a)(4)), and it has consistently provided for both priority of employment and retraining for rail employees who lose their employment by restructurings and abandonments in the rail industry. *E.g.*, 45 U.S.C. §§ 565(b)(4), (5), 907, and 1004. Moreover, in order to preserve a supply of skilled and dedicated rail employees in such a specialized and declining trade, Congress has consistently required that affected rail employees not be left economically unaided by their employers. *E.g.*, 45 U.S.C. §§ 908, 1005, as amended. In the case at bar, however, the court of appeals has derailed Congress' statutory formula for an efficient national rail system by holding that the ICC does not have a statutory duty to consider the interests of all railroad employees who might be affected by the proposed transaction.

In view of the ICC's conclusion that it should approach the public interest determination by considering whether a "transaction would cause any harm to essential services" (Appendix B at 168a), it is crucial to rail labor and to the rail industry that this Court resolve whether petitioners are correct in asserting that the term "carrier employees" in Section 11344(b)(1)(D) refers to all railroad employees, or whether the District of Columbia Circuit is correct in ruling that Congress intended to limit that term to employees of the applicants. In view of the massive Santa Fe-Southern Pacific merger case which is presently pending before the ICC,[9] it is important that this issue be resolved *before* more employees are needlessly and improperly affected without their interests even being weighed by the ICC in its public interest determination.

II. The Court Of Appeals Has Decided An Issue Important To The Orderly Administration Of The Interstate Commerce Act In Such A Manner As To Misstate Legislative History And To Conflict With Earlier Decisions By Three Judge Courts Authoritatively Construing 49 U.S.C. § 11347

When the court of appeals' decision in this case and in *Lamoille Valley R.R.* v. *ICC, supra,* are analyzed, it becomes apparent that the District of Columbia Circuit reached its

[9] *Santa Fe-Southern Pac. Corp.—Control—Southern Pac. Transp. Co.*, ICC Finance Docket No. 30,400.

erroneous decision to narrow the class of employees encompassed by 49 U.S.C. § 11344(b)(1)(D) in order to maintain the internal logic of its holding that Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, did not require the ICC to provide a fair arrangement to protect the interests of all affected railroad employees, notwithstanding the clear language in former Section 5(2)(f) of the Act. *See*, note 3, *supra*. That internal logic holds as long as the term "carrier employees" is construed narrowly to exclude all but applicant carrier employees; but if, as shown above, such an exclusion is contrary to Congress' intent and to the clear meaning of the Act, then the court of appeals' clearly erred in ruling that Section 11347 requires the ICC to protect employees of the applicant carriers only.

While the Fifth Circuit has reached the same conclusion with respect to the scope of Section 11347, albeit in a manner that lacks the consistency of the *Lamoille Valley* court's reasoning since the Fifth Circuit implicitly assumed that Section 11344(b)(1)(D)'s procedural protections applied to all carrier employees (*Missouri-Kansas-Texas R.R.* v. *United States*, *supra*, 632 F.2d at 411-13), the decision below is in direct conflict with the decisions of other reviewing courts which had addressed this issue prior to Congress' amendment of Section 5(2)(f) in 1976.[10] *Soo Line R.R.* v. *United States*, *supra*; *Railway Labor Executives' Assoc.* v. *United States* [hereinafter, "*Richmond Terminal*"], *supra*, 216 F. Supp. at 102-03; *accord*, *Railway Labor Executives' Assoc.* v. *United States*, *supra*, 226 F. Supp. at 525. Moreover, since the ICC had accepted the *Soo Line* and *Richmond Terminal* courts' construction of the statute before Congress in 1976 expanded the protections required to be given by Section 11347's predecessor, *see*, *Pennsylvania R.R.—Merger*, 347 I.C.C. 536, 546 (1974), the lower court's narrowing of those protections is also contrary to accepted principles of statutory construction and, indeed, misstates applicable legislative history.

When it considered the scope of former Section 5(2)(f), the *Soo Line* court recognized Congress' concern for an efficient national transportation system, and concluded that this policy

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[10] Section 402(a), Pub. L. No. 94-210, 90 Stat. 31, 62 (1976). That amendment required the ICC to expand the levels of protection which it normally imposed in merger, control and similar transactions.

admits no distinction between the employees of applicants and the employees of other railroads when construing the reach of Section 5(2)(f). *Soo Line R.R.* v. *United States, supra,* 280 F. Supp. at 923-24. Moreover, the clear language of the statute required that result, for as that court stated:

> The initial sentence of § 5(2)(f) admits no ambiguity: "... [T]he Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." To be protected, the employee need only fulfill two requirements: he must be a railroad employee and he must be affected by the merger.

Soo Line, 280 F. Supp. at 922 (footnote omitted). That same approach had been followed by the *Richmond Terminal* court and by the 1964 *Railway Labor Executives' Association* case, although in that latter case the court upheld the ICC's factual conclusion that the employees were not sufficiently affected by the transaction to meet the second prong of the test for protection under the arrangement required by Section 5(2)(f). 226 F. Supp. at 525; *see, Richmond Terminal, supra,* 216 F. Supp. at 102. Moreover, that same construction of the Act was accepted by the ICC unequivocally in 1974. *Pennsylvania R.R.—Merger, supra,* 347 I.C.C. at 546.

Unfortunately, the court of appeals below, by adopting the *Lamoille Valley* decision, looked not to the language of Section 11347 to divine its meaning, but rather, considered the ICC's present reluctance to apply that section properly as having been sanctioned by Congress when it increased the levels of protection required as a minimum by that section in 1976.[11] In asserting that the 1976 amendment to Section 5(2)(f) evidenced a congressional acceptance of a narrow construction of the scope of that provision, the court of appeals ignored the fact that when Congress amended that section in 1976, the ICC was following the *Soo Line* and *Richmond Terminal* rationale. *E.g., Pennsylvania R.R.—Merger, supra.* Therefore, if the basic principles of statutory construction are to be followed, it was error to presume that Congress implicitly intended to repeal the ICC's proper, albeit belated, acceptance of the *Richmond Terminal* and *Soo Line* construction of the statute where

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[11] *See,* note 10, *supra.*

Congress did not indicate any intention to override the *Pennsylvania Merger* case. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275(1974). Moreover, the court's reliance upon the 1976 amendment is inconsistent with the fact that the effect of the 1976 amendment was congressional disapproval of the Commission's failure to impose meaningful levels of protection for railroad employees. *See, New York Dock Ry.* v. *United States*, 609 F.2d 83, 91-94 (2d Cir. 1979).

When viewed properly, the 1976 amendment actually fortifies Rail Labor petitioners' position, for by requiring an arrangement which, among others, provides protections at least as protective as those established by Section 405 of the Rail Passenger Service Act [hereinafter, "RPSA"], 45 U.S.C. § 565, Congress has in effect mandated that employees of non-applicant carriers be protected. Section 405(a) of the RPSA was amended prior to 1976 to require that employees of the contracting carriers *and* "employees of terminal companies" be protected, and the provisions under 45 U.S.C. § 565 to which Section 5(2)(f) referred expressly extended such protections to those employees. Appendix C-1, Article III.

In its reaching to find some support for its rejection of the *Soo Line* and *Richmond Terminal* cases, the court of appeals asserted that its narrow interpretation of Section 11347 was fortified by the second sentence of that statute which now reads as follows: "Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees." However, that assertion is frivolous, for when the codified language is compared with both the original provision and the history of employee protection in the railroad industry, it becomes apparent that Congress never intended to limit the protections afforded by Section 11347 to applicant carrier employees only.

Before it was recodified, the language relied upon by both the ICC and the court of appeals read as follows:

> Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees *may hereafter be entered into by any carrier or carriers by railroad* and the duly authorized representative or representatives of its or their employees.

49 U.S.C. § 5(2)(f), Appendix J hereto (emphasis added).[12] When that language is viewed together with the fact that national collective bargaining was an accepted feature of the railroad industry in 1940 (*e.g.*, Washington Job Protection Agreement of 1936), national bargaining for job security agreements was obviously envisioned by Congress when it drafted Section 5(2)(f). Indeed, agreements by non-merging carriers which in effect provide protections for their employees from effects caused by a merger by others, have occurred before. *E.g.*, Agreement of February 7, 1965, National Mediation Board File No. A-7128.

A fundamental error of the court of appeals' reliance on the recodified language of Section 11347 to interpret the scope of that provision, is that when Congress codified that provision in 1978, it did so with the express understanding that the codification restates "without substantive change" the prior acts, and that the recodification "may not be construed as making a substantive change in the laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. 1466. Congress explained in its report to accompany the recodification statute (H. Rpt. No. 95-1395, 95th Cong., 2d Sess. at 9 (1978)) that:

> Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged.

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[12] The breadth of Section 5(2)(f) is further evidenced by the second sentence of that provision which read in pertinent part that: "In its order of approval the Commission shall include terms and conditions providing that . . . such transaction will not result in *employees of the carrier or carriers by railroad affected by such order* being in a worse position with respect to their employment . . . ." Appendix J (emphasis added).

By looking to the language of the recodified statute to find the proper construction of a 1940 statute, the court of appeals below and the *Lamoille Valley* court ignored the limited nature of that recodification. *E.g., Atchison, Topeka & Santa Fe Ry.* v. *United States,* 617 F.2d 485, 490 (7th Cir. 1980).

As shown by the first reason for granting this writ, the issues presented by this petition are important to all rail employees today. Because virtually the entire rail system in the Western part of our country will be affected by the merger case now pending before the ICC, rail labor and, indeed, the entire rail industry must know whether the *Soo Line* and *Richmond Terminal* cases or the case at bar express the proper construction of the scope of Section 11347 of the Interstate Commerce Act.

Conclusion

For the reasons set forth herein, the Rail Labor petitioners respectfully request that a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia Circuit to review and to reverse the judgment of that Court.

Respectfully submitted,

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Date: October 19, 1984

Appendix I

Excerpts from *Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295 (D.C. Cir. 1983)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1498

LAMOILLE VALLEY RAILROAD COMPANY, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

Argued February 25, 1983
Decided June 28, 1983

Before: WILKEY and WALD, *Circuit Judges,* and BONSAL,* *Senior District Judge* for the Southern District of New York.

Opinion for the Court filed by *Circuit Judge* WALD.

[711 F.2d at 300]

WALD, *Circuit Judge:* We review here a decision of the Interstate Commerce Commission (ICC or Commission) approving unconditionally the merger of the Maine Central Railroad with the Boston & Maine Railroad. *Guilford Transportation Industries—Control—Boston & Maine Corp.,* 366 I.C.C. 292 (1982) [hereinafter cited as *Boston & Maine Merger*].[1] Petitioners, competitors of the Boston & Maine,

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] The ICC shortly thereafter approved unconditionally the merger of the combined Boston & Maine/Maine Central with the Delaware & Hudson Railroad. Guilford Transp. Indus.—Control—Delaware & Hudson Ry., 366 I.C.C. 396 (1982) [hereinafter cited as *Delaware & Hudson Merger*]. We review the ICC's decision concerning the Delaware & Hudson in a companion case to this one, also issued today. Central Vt. Ry. v. ICC, No. 82-2136, ____F.2d____ (D.C. Cir. June 28, 1983).

asked the ICC to protect them from competitive harm due to the merger by imposing various conditions on the merged entity (including sale of track, trackage rights, and preservation of swift traffic interchanges). The ICC declined to impose any protective conditions, finding that none of the petitioners had shown that the conditions it requested were needed to prevent the loss of "essential services."

Petitioners appeal to this court, claiming that the ICC's "essential services" test for imposing protective conditions is too strict and does not comply with the statutory directive that the ICC consider the effect of the merger on "adequacy of transportation to the public." 49 U.S.C. § 11,344(b)(1). Petitioners also argue that some of the ICC's findings are not supported by substantial evidence and that the ICC committed a variety of procedural errors. We reject the procedural challenges as either without merit or not constituting prejudicial error. We conclude, however, that the ICC's essential services test, as applied to petitioner Lamoille Valley Railroad, does not comport with the statute. We also find flaws in the agency's reasoning with regard to protective conditions requested by petitioner Canadian National Railroad. We therefore affirm in part, reverse in part, and remand to the ICC to determine whether protective conditions are needed to protect the public's right to adequate transportation.

* * * *

[711 F.2d at 323-24]

LABOR PROTECTIVE CONDITIONS

In reviewing a railroad merger, the ICC must consider, as part of its public interest determination, "the interest of carrier employees affected by the proposed transaction." 49 U.S.C. § 11,344(b)(1)(D). Moreover, *id.* § 11,347 requires the ICC to protect displaced employees:

> When a rail carrier is involved in a transaction for which approval is sought under [§ 11,344], the Interstate Commerce Commission shall require the carrier to provide a fair arrangement . . . [for] employees who are affected by

> the transaction .... Notwithstanding this [Act], the arrangement may be made by the rail carrier and the authorized representative of its employees.

The Commission provided suitable arrangements for Maine Central and Boston & Maine employees. It did not consider the interests of, nor provide protection for, employees of competing railroads who may lose their jobs as a result of traffic diversions. *See Boston & Maine Merger,* 366 I.C.C. at 344. Lamoille Valley asserts that this was error. We affirm the Commission's interpretation of §§ 11,344(b)(4) and 11,347 as requiring it to protect only employees of the merging railroads and not employees of other railroads.

First, the ICC's interpretation of the language of § 11,347 is sensible. The second sentence of § 11,347 provides that "the arrangement may be made by *the rail carrier* and the authorized representative of *its* employees." (Emphasis added.) The phrase "the rail carrier" presumably refers back to the preceding sentence and thus includes only "a rail carrier ... involved in the transaction." But an arrangement between "a rail carrier involved in the transaction" and "its employees" will not protect employees of other carriers. Thus, Congress must not have contemplated protecting employees of non-applicant railroads. As for § 11,344(b)(4), it was first enacted at the same time as § 11,347, and the two sections should be construed *in pari materia.*

The legislative history of § 11,347 strongly supports this interpretation. *See Missouri-Kansas-Texas Railroad* v. *United States,* 632 F.2d 392, 411-12 (5th Cir. 1980) (reviewing the legislative history), *aff'g Burlington Northern—Control—St. Louis-S.F., supra* note 37, 360 I.C.C. at 948-50, *cert. denied,* 451 U.S. 1017 (1981).[59]

Second, while there may be policy reasons for treating all railroad employees alike regardless of their employer, the Commission's interpretation is supported by considerations of practicality and administrative economy. As the Commission explained in *Burlington Northern,* 360 I.C.C. at 949-50:

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[59] *See generally* New York Dock Ry. v. United States, 609 F.2d 83, 86-90 (2d Cir. 1979) (reviewing at length the development of § 11,347 and predecessor provisions).

> It is difficult enough to determine which employees of a railroad involved in the transaction have been adversely affected by that transaction. To require a determination that employees of another competing carrier have also been affected by a merger . . . would place an impossible burden on the party required to rebut the allegation.

Third, the Commission has consistently interpreted § 11,347, since its original enactment in 1940, to exclude employees of non-applicant railroads.[60] That consistent interpretation is entitled to deference, especially since Congress implicitly approved that interpretation in revising and reenacting § 11,347 in 1976.[61] *See NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) (additional deference to an agency's statutory interpretation is due "where Congress has reenacted the statute without pertinent change") (footnote omitted).

Finally, other courts that have addressed this issue have consistently approved the Commission's interpretation, including the only court to consider the issue since the 1976 amendments to the Interstate Commerce Act. *See Missouri-Kansas-Texas Railroad* v. *United States,* 632 F.2d 391, 411-12

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[60] *See Missouri-Kansas-Texas Railroad* v. *United States,* 632 F.2d at 411 n.44 (citing ICC cases); *see also CSX—Control—Chessie System, supra* note 21, 363 I.C.C. at 590-91.

Pennsylvania R.R.—Merger—New York Cent. R.R., 347 I.C.C. 536, 546 (1974), cited by Lamoille Valley, is not to the contrary, despite the ICC's use of certain broad language. The Commission there construed the predecessor to § 11,347 to cover employees of wholly-owned *subsidiaries* of the merging railroads. It had no occasion to address the status of employees of independent railroads.

[61] The 4R Act, *supra* note, 5, § 402(a), 90 Stat. at 62, added the requirement that labor protective conditions be "no less protective of the interests of employees than those heretofore imposed pursuant to this [section]." Section 402(a) was a last-minute addition to the statute, and there is no legislative history dealing with it. *See* New York Dock Ry. v. United States, 609 F.2d 83, 93 (2d Cir. 1979). This provision was rephrased to its present form without substantive change in the 1978 recodification of the Interstate Commerce Act. *See* 49 U.S.C. note preceding § 10,101 (no substantive change intended); *id.* § 11,347 revision note (explaining wording changes).

(5th Cir. 1980) (a thorough opinion on which our own analysis relies heavily), *cert. denied,* 451 U.S. 1017 (1981); *Florida East Coast Railway* v. *United States,* 259 F. Supp. 993, 1019 (M.D. Fla. 1966) (3-judge court), *aff'd mem. in part and appeal dismissed in relevant part as moot,* 386 U.S. 544 (1967); *Railway Labor Executives' Association* v. *United States (RLEA 2d),* 226 F. Supp. 521, 524-25 (E.D. Va.) (3-judge court), *vacated and remanded per curiam,* 379 U.S. 199 (1964).[62]

* * * *

[711 F.2d at 331]

VII. Conclusion

The ICC's approval of the Maine Central/Boston & Maine merger as a whole is *affirmed.* We *reverse* the Commission's decision denying the protective conditions sought by Lamoille Valley and Canadian National, and *remand* to the Commission to reconsider whether protective conditions (not necessarily the ones sought by Lamoille Valley and Canadian National) are needed to preserve competition or adequate transportation. On all remaining issues, the Commission's decision is *affirmed.*

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[62] *But see* Soo Line R.R. v. United States, 280 F. Supp. 907, 921-24 (D. Minn. 1968) (3-judge court); United Transp. Union, Local Lodge No. 693-E v. Burlington N., Inc., 319 F. Supp. 451, 453-54 (D. Minn. 1970) (following *Soo Line*).

Railway Labor Executives' Ass'n v. United States (*RLEA 1st*), 216 F. Supp. 101 (E.D. Va. 1963) (3-judge court), cited by Lamoille Valley, is distinguishable. It involved a joint facility run by a merging railroad and a non-merging railroad. The court held that employees working at the facility, who were nominally employees of the non-merging railroad but in fact worked for both railroads, were entitled to protection. *See id.* at 103. A year later, the same court, including two of the three judges that decided *RLEA 1st,* upheld the ICC's refusal generally to protect employees of non-merging railroads in *RLEA 2d.*

Appendix J

Side By Side Comparison
Of Section 5(2)(f) And As Recodified

APPENDIX J

Side By Side Comparison Of Section 5(2)(f) And As Recodified

Section 11347

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

Section 5(2)(f)

(f) As a condition of its approval, under this paragraph (2) or paragraph (3), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.